STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

V

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP

Defendants-Appellants,

AND

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants.
_____/

No. 121890

Court of Appeals
No. 232706

Marquette County Circuit Court
No. 00-037979-CE

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

F. Michelle Halley (P62637)
PO Box 914
Marquette, MI 49855
(906) 361-0520

Neil S. Kagan (P58948)
National Wildlife Federation
213 West Liberty, Ste. 200
Ann Arbor, MI 48104-1398
(734) 769-3351
Counsel for Plaintiffs-Appellees

(Additional Name on Inside Cover)

Dated: October 23, 2003

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Michigan Cases

Federal Cases

Other State Cases

Michigan Constitution

Other State Constitutions

Michigan Statutes

Federal Statutes

Other State Statutes

Other

STATEMENT OF BASIS FOR JURISDICTION

The jurisdictional summary stated in the brief of Defendants-Appellants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership (collectively "Empire") is complete and correct.

COUNTERSTATEMENT OF STANDARD OF REVIEW

The standard of review stated in Empire's brief is not complete and correct. Empire identified the standard of review as the one that governs whether a party has standing. *See* Defendant-Appellants' Brief on Appeal at 13. The question before the Court, however, concerns the constitutionality of the legislature's grant of standing under the Michigan Environmental Protection Act. *See Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 468 Mich 941; 664 NW2d 222 (2003) ("[T]he issue [is] whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing. See *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 629 NW2d 900 (2001)."). The standard of review, then, is the one governing the constitutionality of a statute.

The constitutionality of a statute is a question of law, which the Court reviews de novo. *Blank v Dep't of Corrections*, 462 Mich 103, 112; 611 NW2d 530 (2000). The Court uses the power to declare a statute unconstitutional only when the violation is clear. *Gauthier v Campbell, Wyant & Cannon Foundry Co.*, 360 Mich 510, 515; 104 NW2d 182 (1960).

COUNTERSTATEMENT OF QUESTION INVOLVED

1.

CAN THE LEGISLATURE BY STATUTE CONFER STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING?

The trial court answered "no."

The Court of Appeals answered "yes."

Plaintiffs-Appellees National Wildlife Federation and Upper Peninsula Environmental Council answer "yes."

Defendants-Appellants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership answer "no."

Defendants-Appellees Michigan Department of Environmental Quality and Russell J. Harding, Director of the Michigan Department of Environmental Quality, answer "yes."

COUNTERSTATEMENT OF FACTS

Plaintiffs-Appellees National Wildlife Federation and Upper Peninsula Environmental Council (collectively "NWF") agree with the chronology in the Statement of Facts in Empire's brief. NWF provides the following supplement to make the Court aware of additional key facts.

Over the last ten years, the Empire Mine and neighboring Tilden Mine (also owned in part by Empire), have destroyed almost 400 acres of wetlands and 20,224 lineal feet (3.83 miles) of streams. Appendix ("App") at 137a. Empire's mining operations have taken a heavy toll on the region's watersheds and the citizens who recreate there. The single permit at issue here would authorize the destruction of approximately 80 acres of wetlands and almost one mile of stream. *Id.* Although mitigation (the creation of new wetlands) is required for the destruction of wetlands, that mitigation will not occur in the same watershed, and the streams will of course not be replaced. *Id.* at 138a.

The Michigan Department of Environmental Quality ("MDEQ") originally denied Empire's permit application because of objections by the United States Environmental Protection Agency ("EPA").[1] App at 139a-140a. The objections centered upon the lack of an environmental assessment of direct, indirect, and cumulative impacts and insufficient mitigation. *Id.* Empire then submitted an environmental assessment which was not subject to public comment. Based upon the environmental assessment, EPA lifted its objection subject to several conditions, including the following:

- Empire must provide a detailed description why portions of used pits could not be used for rock stockpiling or as tailings basins,
- Empire must conduct additional water quality monitoring in wetlands and streams located downstream of mining activities,
- Empire must attempt to avoid trout streams, bogs, and coniferous wetlands,
- Empire must avoid impacts to streams that have the potential to support brook trout populations,
- Empire must better assess wetlands to be impacted,
- Empire must prepare an adequate survey for rare biological resources, particularly rare plants, and
- Empire must provide improved mitigation.

App 143a-145a.

On August 29, 2000, MDEQ issued the permit to Empire even though it had not met all of EPA's conditions. App 107a-118a. Specifically, the permit allows impacts to a stream that has the potential to support brook trout populations and the destruction of

[1] The MDEQ cannot issue a permit that authorizes a project under the federal Clean Water Act over a federal objection. *See* 33 USCA 1344.

rare conifer swamps, stream mitigation plans do not meet the EPA's objections, and an adequate survey for rare plants was not conducted. *Id.*

Empire mentioned that NWF's expert witness did not file comments on the permit during the public comment period, wrongfully implying that NWF did not file comments. *See* Defendants-Appellants' Brief on Appeal at 4. During the public comment period, members of both National Wildlife Federation and Upper Peninsula Environmental Council submitted comments on the proposed permit. App 2b-11b. In addition, NWF opposed the permit application from the outset, filing comments to that effect. App 4b-11b. NWF then filed a Petition for a Contested Case hearing with the MDEQ in a timely manner after the permit was issued. App 48a-53a.

Empire's environmental assessment conceded that "direct impacts to wildlife from the Empire and Tilden mines are severe," that "habitat loss will result in a reduction of wildlife populations at the local level, and perhaps at a larger scale," and that "the overall function of the landscape for wildlife is diminished." App 1b. Given these concessions, the concerns about destruction of wetlands and streams and impairment of opportunities to view wildlife expressed in affidavits submitted to the trial court by members of National Wildlife Federation and Upper Peninsula Environmental Council were valid. App 42a-47a.

SUMMARY OF ARGUMENT

The Michigan Constitution allows the legislature to grant standing to a party who does not satisfy the judicial test for standing. Throughout the nineteenth century when the relevant constitutional provisions were first adopted, the common understanding of the nature of judicial power was that it included cases brought by citizens to protect the

public interest. While many courts refused to hear such cases, they did so only when the legislature had not provided citizens with a cause of action. The legislature was and continues to be the branch of government empowered and uniquely qualified to decide when citizens should have standing to protect both private and public interests in court. The exercise of this power in no way infringes on the executive's duty to see that the laws be faithfully executed.

Michigan's judiciary is not limited by a "cases and controversies" clause, as is the federal judiciary. Nor is the Separation of Powers Clause found in Michigan's and other states' constitutions comparable to the federal Cases and Controversies Clause. The standing doctrine binding federal courts thus does not apply in Michigan, leaving Michigan courts free, indeed obligated, to hear cases brought by private attorneys general when authorized by the legislature.

In any case, the Michigan Constitution specially directs the legislature to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Const 1963, art. 4, § 52. The legislature's grant of open standing under the Michigan Environmental Protection Act ("MEPA") was thus authorized by the constitution.

The Michigan Constitution thus generally and specially empowers the legislature to establish standing requirements in suits to protect the state's natural resources. Both the legislative and executive branches deem MEPA's grant of standing to be constitutional, and the court should defer to the judgment of the other two branches given the lack of a clear constitutional mandate against it.

ARGUMENT

The question involved in this case is whether the Michigan Constitution allows the legislature to grant standing to a party who does not satisfy the judicial test for standing and specifically, whether the universal grant of standing found in the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701, is valid under the Michigan Constitution. A review of court practices when Michigan first adopted the Separation of Powers Clause, relevant case law, and the constitution itself indicate that not only is this permissible, but that the legislature has the duty to establish the rights of citizens and to determine how best to enforce them. Nothing limits these rights and their enforcement to those that are peculiar to certain individuals, rather than shared by the entire public.

In framing the question involved in this case, the Court referred to *Lee v Macomb Cty Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001). *See Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 468 Mich at 941. The case at bar and *Lee* are significantly different, however. The plaintiffs in *Lee* had no legislatively or judicially created cause of action. They asked the Court to hear their case simply on the basis that the law was not being followed, and that they were allegedly injured by the failure to follow the law. This Court properly determined that the case was not justiciable. That determination maintained the appropriate roles of the courts and the legislature under the separation of powers doctrine, as the legislature had not evinced the intent to allow the plaintiffs to sue for the remedy sought.

In the case at bar, the legislature *has* evinced that intent, and has done so to meet a duty specially delegated to it by the constitution—to protect the state's natural resources. The constitutionality of this legislative enactment is supported by long-standing

precedents decided by this Court. Nullifying the legislature's action would depart from those precedents and turn the separation of powers doctrine on its head. Nothing in the Michigan Constitution requires or allows such an outcome.

I. UNDER THE MICHIGAN CONSTITUTION, THE LEGISLATURE MAY BY STATUTE CONFER STANDING ON ALL CITIZENS TO ENFORCE PARTICULAR RIGHTS.

Throughout the history of this country, both federal and state courts have addressed a vast number of cases in which plaintiffs sought to have laws enforced as members of the public whom the law was intended to benefit. The various jurisdictions differ greatly on whether to entertain these cases, ranging from state courts that hear such matters on a routine basis to federal courts that require plaintiffs to have some heightened, personal stake in the matter at hand. However, the vast majority of these cases did not address legislative grants of standing allowing citizens to bring lawsuits to vindicate the public interest. They addressed situations where members of the public sought judicial review at the discretion of the courts.

This distinction is very important, and reflects the origins and history of standing doctrine. Throughout the nineteenth and early twentieth centuries, the question courts asked in determining whether the plaintiff was a proper party to bring a suit was whether that plaintiff had a legally cognizable right or interest in the subject matter of the litigation. Legally cognizable interests were interests that had been recognized at common law or had been established by the legislature. The analysis began and ended there; courts simply did not second-guess whether a right established by the legislature was of sufficient importance to an individual citizen. It was and continues to be the role of the legislature to establish legal rights and interests and to determine which of those

rights citizens should be allowed to protect through judicial process. Judicial refusal to enforce such legislatively-established rights would amount to a usurpation of legislative power.

That the legislature should be the entity to establish the rights of citizens and to determine how best to protect those rights is a tenet so fundamental to our democratic form of government that it needs little explication. As this Court has pointed out, "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's." *O'Donnell v State Farm Mutual Auto Ins*, 404 Mich 524, 542; 273 NW2d 829 (1979). In *Lee*, the Court stated, "Concern with maintaining the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches." 464 Mich at 736. The Court should exercise its vigilance in this case by respecting the legislative power as expressed in the passage of the Michigan Environmental Protection Act.

A. The Legislature's Grant Of Standing Under The Michigan Environmental Protection Act Is Consistent With The Separation Of Powers Provision In The Michigan Constitution.

The separation of powers provision of the Michigan Constitution provides as follows:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. Const 1963, art 3, § 2.

Whether a legislative grant of standing to any person to protect rights or interests belonging equally to all citizens is consistent with the separation of powers doctrine thus

depends on the parameters of the legislative, executive, and judicial powers. As the Michigan Constitution does not clearly define these powers, their definitions must be drawn from a general understanding of the meaning of the terms. *See Lujan v Defenders of Wildlife*, 504 US 555, 559-60; 112 S Ct 2130; 119 L Ed 2d 351 (1992) ("The Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."). The meaning placed on the terms by the courts at the time the constitution was drafted is especially relevant to ascertaining the framers' intent. *See Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374-375; 663 NW2d 436 (2003) (in construing technical, legal terms in the Constitution, "we are to rely on the understanding of the terms by those sophisticated in the law at the time of the constitutional drafting and ratification").

As explained below, both this Court and the United States Supreme Court in their early jurisprudence understood judicial power to extend to cases brought by private citizens to vindicate public rights. While the courts generally refused to hear such cases, that refusal was based on judicial restraint in the absence of legislation, rather than on constitutional limitations. Most state courts concur in this understanding, and allow public interest cases where a statute allows it or where the question presented is of sufficient public importance.

1. Historically, the judicial power was understood to encompass cases beyond those in which the plaintiff had a particular stake in the outcome.

The treatment of taxpayer or citizen suits throughout the history of this country illustrates that it has *not* been the general understanding that judicial power is limited to

cases where plaintiffs have a stake in the outcome beyond that of the general public. Historically, the judicial power was thought to extend to any situation brought to it by two adverse parties where the events had already occurred or were concrete enough to allow for application of the relevant law. All of these features are present in this case.

Although some courts did limit the cases they heard to those where the plaintiff had a legally protected interest beyond that of the general public, that limitation was recognized as prudential rather than inherent in the nature of judicial power, and could thus be changed by legislative decree. Most courts (including the Michigan Supreme Court) recognized that it was within their authority to hear cases brought by members of the public who had no greater interest in the issue than the public at large. When courts declined to hear such cases, it was for much the same reason that courts do not often establish new causes of action or new remedies: that is the role of the legislature.

Although some courts (including the United States Supreme Court) held that they were constrained from hearing cases brought by individuals to protect the public interest, in light of the courts' historic approach this constraint can only be understood as a refusal to legislate new legal interests where they had not previously existed. Neither litigants nor courts in the nineteenth and early twentieth century questioned the legislature's power to establish that any citizen could bring a lawsuit to enforce particular laws. Qui tam cases that granted just such powers to citizens were the norm at both the founding of the nation and in 1850, when Michigan's Separation of Powers Clause was first adopted. These historic approaches and understandings are a far better indicator of the meaning of Michigan's Separation of Powers Clause than current federal standing doctrine, which did not begin to develop until 1970.

a. This court's precedents establish that standing limitations are prudential rather than constitutional.

In 1880, the Michigan Supreme Court unequivocally held that its practice of not allowing unaffected parties to bring lawsuits to protect the public interest "is one of discretion and not of law." *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 429; 4 NW 274 (1880). The Court then exercised its discretion to hear the case despite its conclusion that "[i]t cannot be said that relator has any greater legal interest than other citizens." *Id.* Although the Court noted that "[t]here are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed," it also stated that such an action might in some cases be permissible "under circumstances where the public injury, by its refusal, will be serious." *Id.* A factor in the Court's decision to allow the case was that "the officer whose duty it usually is to enforce the rights of the state in this Court has, in the performance of his official functions as adviser of the state officers, placed himself in an adverse position, and appears for the respondent on this application." *Id.* That is, of course, also true in this case.

That standing limitations on lawsuits to vindicate the public interest are prudential rather than constitutional has been the rule in Michigan since at least 1856. Although the Supreme Court then refused to hear a case before it because the plaintiff had no interest other than that of the general public, it stated, "we do not intend to say that a case may not arise in which this court would allow an individual to file such a complaint, particularly if the attorney-general or prosecuting attorney (as the case may be) were absent, or refused to act without good cause...." *People v Regents of the University*, 4 Mich 98, 103 (1856).

In 1856, then, this Court clearly understood that it was not constitutionally constrained from entertaining a case where the plaintiff had no "individual interest in the subject matter of [the] complaint which is not common to all the citizens of the state . . . ." *Id.* The Court reached its holding after surveying the opinions of other state courts and concluding that New York and Illinois allowed lawsuits brought by private citizens on behalf of the general public, while Maine, Massachusetts and Pennsylvania did not. (As discussed below, Massachusetts and Pennsylvania have since changed their position.) Thus, in 1856 this Court recognized that there was no common understanding that judicial power was limited to cases in which the plaintiff had a greater interest than that of the general public. Once again, it is important to note that neither of these early cases presented a situation wherein the legislature had provided the plaintiff with a cause of action.

b. Many state courts agree that standing requirements are not constitutionally required.

A number of states with constitutions containing separation of powers provisions virtually identical to Michigan's hold that their courts may hear cases brought by citizens or taxpayers to protect the public interest. For instance, the Supreme Judicial Court of Massachusetts stated as follows in *Tax Equity Alliance for Mass v Comm'r of Revenue*, 672 NE2d 504, 508-09 (Mass, 1996) (citations omitted):

> Under the public right doctrine, any member of the public may seek relief in the nature of mandamus to compel the performance of a duty required by law. In such cases, the plaintiff acts under the public right to have a particular duty performed that the law requires to be performed. Where the public right doctrine applies, the people are considered the real party in interest, and the individual plaintiff need not show that he has any legal interest in the result.

The Massachusetts Constitution includes one of the nation's earliest separation of powers clauses.[2]

The Arizona Supreme Court has held, "Because our state constitution does not contain a 'case or controversy' provision analogous to that of the federal constitution, we are not constitutionally constrained to decline jurisdiction based on lack of standing." *Sears v Hull*, 961 P2d 1013, 1019 (Ariz, 1998).[3] The Wyoming Supreme Court waives standing requirements when "faced with a matter of great public interest or importance," *Mgmt Council v Geringer*, 953 P2d 839, 842 (Wyo, 1998) (quoting State ex rel Wyo Ass'n of Consulting Engineers and Land Surveyors v Sullivan, 798 P2d 826, 828-29 (Wyo, 1990)), which it of course could not do if these requirements were constitutionally mandated.[4] Similarly, in New Mexico "even though a private party may not have standing to invoke the power of this Court . . . this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of

---

[2] "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Mass Const 1780, Part 1, art XXX.

[3] The Arizona Constitution provides, "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz Const 1910. art III.

[4] The Wyoming Constitution provides, "The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." Wyo Const 1977, art II, § 1.

great public importance." *State ex rel Clark v Johnson*, 904 P2d 11, 17-18 (NM, 1995) (quoting State ex rel Sego v Kirkpatrick, 524 P2d 975, 979 (1974)).[5]

The Florida Supreme Court has held that parents of schoolchildren could challenge the state's failure to provide adequate resources to schools in violation of the Florida Constitution, even though it acknowledged that this failure presumably hurt all school children of the state equally. *Coalition for Adequacy v Chiles*, 680 S2d 400, 403 (Fla, 1996).[6] The Alabama Supreme Court allows taxpayer lawsuits to restrain government expenditures not authorized by law. *Hunt v Windom*, 604 S2d 395, 397-98 (Ala, 1992).[7]

In Minnesota, the rule has long been that the legislature is free to eliminate standing requirements: "In conclusion, there is no constitutional basis for imposing a more stringent standing requirement upon would-be participants in agency standard-making proceedings . . . than any such requirement which is set by the governing

---

[5] The New Mexico Constitution provides, "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." NM Const 1986, art III, § 1.

[6] The Florida Constitution provides, "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla Const 1962, art II, § 3.

[7] The Alabama Constitution provides, "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala Const 1901, art III, § 43.

statute."[8] *Minn Pub Interest Research Group v Minn Dep't of Labor*, 249 NW2d 437, 441 (Minn, 1976). The Minnesota Supreme Court and Court of Appeals thus look no farther than the language of the Minnesota Environmental Rights Act, which provides that "any natural person" may sue to protect natural resources, to determine whether plaintiffs have standing. *See, e.g., White v Minn Dep't of Natural Res*, 567 NW2d 724, 737 (Minn App 1997). The Minnesota Environmental Rights Act was modeled on the Michigan Environmental Protection Act. *Schaller v. County of Blue Earth*, 563 N.W.2d 260, 265 (Minn. 1997).

The New Jersey courts also hold that standing requirements are a matter of judicial restraint rather than a constitutional requirement: "Because standing affects whether a matter is appropriate for judicial review rather than whether the court has the power to review the matter, and standing is a *judicially constructed* and *self-imposed* limitation, it is an element of justiciability rather than an element of jurisdiction." *NJ Citizen Action v Riviera Motel*, 686 A2d 1265, 1270 (NJ Super Ct App Div 1997) emphasis added).[9]

The California Supreme Court and Court of Appeals have specifically upheld the constitutionality of statutes that grant standing to all citizens to enforce particular laws.

---

[8] The Minnesota Constitution provides, "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn Const 1974, art III, § 1.

[9] The New Jersey Constitution provides, "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." NJ Const 1947, art III, par 1.

The Court of Appeals acknowledged the California Constitution's separation of powers provision[10] in rejecting a claim that the California Safe Drinking Water and Toxic Enforcement Act, "in authorizing suits by private citizens who have sustained no injury, violates the separation of powers doctrine under the California Constitution." *National Paint and Coatings Ass'n v California*, 58 Cal App 4th 753, 756; 68 Cal Rptr 2d 360 (1997). The court noted that "California authority *supports* the conclusion that a suit by a citizen in the undifferentiated public interest is 'justiciable,' or appropriate for decision in a California court." *Id.* (emphasis in original). Similarly, the California Supreme Court has held that the Unfair Trade Practices Act validly establishes that "a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others." *Stop Youth Addiction v Lucky Stores*, 950 P2d 1086, 1091 (Cal, 1998). Likewise, the Kansas Supreme Court has held that its legislature may grant standing by statute, even when the plaintiff "does not claim to be affected differently than any other member of the general public." *Crow v Bd of County Comm'rs*, 755 P2d 545, 546 (Kan, 1988).[11]

Although many states do not have specific separation of powers clauses in their constitutions, all have vested the three types of government powers in three distinct branches, and delegated only one type of power to each branch. Courts in these states uphold separation of powers doctrines, but again many recognize that standing limitations

---

[10] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Calif Const 1972, art 3, § 2.

[11] The separation of powers doctrine is inherent in the Kansas constitution. *See State ex rel Anderson v State Office Building Commission*, 185 Kan 563, 567; 345 P2d 674 (1959).

are not constitutionally mandated, and hear certain cases where the plaintiff has no greater interest than that of the general public. *See, e.g., State ex rel Ohio Acad of Trial Lawyers v Steward*, 715 NE2d 1062 (Ohio, 1999) ("when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to the named parties"); *Baird v Charleston County*, 511 SE 2d 69, 75 (SC, 1999) ("a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance"); *Housing Auth v Penn State Civil Serv Comm'n*, 730 A2d 935, 940-41 (Penn, 1999) ("if a statute properly enacted by the Pennsylvania legislature furnishes the authority for a party to proceed in Pennsylvania's courts, the fact that the party lacks standing under traditional notions of our jurisprudence will not be deemed a bar to an exercise of this Court's jurisdiction"); *Gen Motors v New Castle County*, 701 A2d 819, 824 (Del, 1997) ("Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions."); *Parsons v SD Lottery Comm'n*, 504 NW2d 593, 595 (SD, 1993) (quotation omitted) ("In South Dakota a taxpayer need not have a special interest in an action or proceeding nor suffered special injury to himself to entitle him to institute an action to protect public rights."); *Burns v Sundlun*, 617 A2d 114, 116 (RI, 1992) (refusing to dismiss case despite plaintiff's failure "to allege his own personal stake in the controversy that distinguishes his claim from the claims of the public at large"); *State ex rel Boyles v Whatcom County Super Ct*, 694 P2d 27, 29 (Wash, 1985) (recognizing "litigant standing to challenge governmental acts on the basis of

status as a taxpayer"); *Thompson v Kenosha County*, 221 NW2d 845, 849 (Wis, 1972) (same).

The Connecticut Supreme Court holds that parties, "even if not 'classically' aggrieved may still have statutory standing to appeal an agency's decision." *Red Hill Coalition v Conservation Comm*, 563 A2d 1339, 1341 (Conn, 1989). Under the Connecticut Environmental Protection Act "standing is automatically granted . . . to 'any person.'." *Manchester Envtl Coalition v Stockton*, 441 A2d 68, 73-74 (Conn, 1981) (overruled in part on other grounds). "The plaintiffs need not prove any pollution, impairment or destruction of the environment in order to have standing." *Id.*[12]

Empire cites several state cases for the proposition that "the notion of 'judicial power' . . . limit[s] the cases the judiciary may consider." Defendants-Appellants' Brief on Appeal at 31. NWF does not dispute that the notion of "judicial power" limits the cases that the courts may hear; it simply does not limit them in the way that Empire claims. The courts in many of the states cited by Empire hold that they may hear certain cases where the plaintiff is suing to protect the public interest and has no greater personal interest than the public at large. For instance, in Alabama any taxpayer may bring a suit to restrain government expenditures not authorized by law. *Hunt v Windom*, 604 S2d 395, 397-98 (Ala, 1992). In Oklahoma, the requirement that the plaintiff have a personal stake in the outcome of the lawsuit applies only "[i]f reliance is not placed on any specific statute authorizing invocation of the judicial process". *Indep Sch Dist No 9 v*

---

[12] "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Conn Const 1982, art II.

Glass, 639 P2d 1233, 1237 (Okla, 1982). In Illinois, a taxpayer may challenge an allegedly illegal disbursement of public funds if a statute has granted him the right to do so. *Quinn v Donnewald*, 483 NE2d 216, 219 (Ill, 1985). None of these state courts hold that they are constitutionally limited to hearing cases wherein plaintiffs meet the standing requirements laid out by the United States Supreme Court.

c. The history of qui tam cases supports the holdings that standing is not constitutionally mandated.

The legislatively-established role of private citizens in suing to protect the public interest has also been consistently upheld by federal courts in statutory qui tam actions. Qui tam actions are brought by private individuals on behalf of the state and provide the plaintiff with a share of any civil penalties assessed. "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government." *United States ex rel Marcus v Hess*, 317 US 537, 541 n4; 63 S Ct 379; 87 L Ed 443 (1942) (quoting Marvin v Trout, 199 US 212, 225 (1905).

Qui tam actions have been held constitutional by the United States Supreme Court as recently as 2000. *Vt Agency of Natural Res v United States*, 529 US 765; 120 S Ct 1858; 146 L Ed 2d 836 (2000). In that case, the Court found that the plaintiff did *not* meet the requirements of the *Lujan* test, and expressly rejected the view that the plaintiff's monetary interest in the civil penalties provided the requisite "concrete private interest." 529 US at 773. On the other hand, the Court could not ignore the fact that these actions were routinely heard by courts at the time of the federal constitutional convention.

> *Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.
>
> We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Id.* at 777-78 (citations omitted).

The Court purported to find its way out of its conundrum by analogizing the plaintiff in these cases to an assignee of a damages claim. *Id* at 773. However, the Court cited nothing to indicate that this was the view of qui tam actions at the time of the framing of the Constitution. Rather, early court opinions from federal and state courts indicate that the common understanding of judicial power throughout the eighteenth and nineteenth centuries simply was not limited in the manner recently proclaimed by the United States Supreme Court. In fact, the earliest qui tam cases in England did not involve payment to the private prosecutor, and thus could not have been assignments of damages claims. *See* Note, *The History and Development of Qui Tam*, 1972 Wash U L Q 81, 87.

The *Vermont Natural Resources Agency* reasoning suffers from a logical inconsistency as well as an historical one. While the Court acknowledged that any monetary interest in the suit was an interest that all citizens held equally (and therefore could not be the required "concrete injury"), it did not explain why the statute did not assign damages to all citizens equally.

The difficulty with the Court's position can be illustrated by a hypothetical. Suppose an individual has sustained damages and has a clear cause of action to recover those damages. She does not want to take the trouble to go to court, but would like to see the responsible party pay for what it has done. She therefore takes an ad out in a newspaper of large circulation, stating that anyone who brings the lawsuit is welcome to the damages.

A stranger takes her up on this offer, but does not receive a written assignment of the damages before filing the complaint. Instead, he offers the advertisement to establish his standing in the case. Would the court hear the case on this basis? Clearly not; an assignment of damages to any member of the public is simply not the same as an assignment to an individual.

A plaintiff in a qui tam action is in the same position as the stranger in the hypothetical. No public entity has recognized him as the specific individual who has been assigned the government's right to damages. Just as with his monetary interest in the lawsuit, it is not until he files the lawsuit that the assignment becomes specific to him.

The logical inconsistency of the *Vermont Agency of Natural Resources* opinion only serves to highlight the historical fallacy behind current federal standing law. The historical fact is that both federal and state courts heard cases that differ in no substantive way from today's citizen suits. After reviewing qui tam actions in England and America, the University of Chicago Law School Llewellyn Professor of Jurisprudence Cass Sunstein, in *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich L R 163, 176 (1992), concluded as follows:

> The history suggests that the bounty is designed to offer an incentive, not to create an injury where none existed before. A declaratory judgment or an injunction

> serves the same purposes as a victorious suit in a qui tam or informers' action. Indeed, mandamus suits did not involve money at all, and these too were accepted during the early period.

Although state qui tam statutes were attacked in the late 1800's under constitutional requirements that all fines go to county or school funds, *see e.g.*, *Southern Express Co v Commonwealth*, 22 SE 809 (Va, 1895); *State v Indiana & Southern Ill R Co*, 32 SE 817 (Ind, 1892); *Dutton v Fowler*, 27 Wis 427 (1871), they were not attacked as a violation of the separation of powers. Neither courts, legislatures, nor the public in the nineteenth century believed that these cases went beyond the judicial powers of the courts. As Professor Sunstein points out,

> [W]hat is especially revealing is that there is no evidence that anyone at the time of the framing believed that a qui tam action or informers' action produced a constitutional doubt. No one thought to suggest that the "case or controversy" requirement placed serious constraints on what was, in essence, a citizen suit. This fact provides extremely powerful evidence that Article III did not impose constraints on Congress' power to grant standing to strangers. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich L R 163, 175-76 (1992),

This history provides a revealing backdrop to the Michigan Supreme Court's opinions in *People v Bd of State Auditors*, 42 Mich 422; 4 NW 274 (1880), and *People v Regents of the University*, 4 Mich 98, 103 (1856), discussed above. In light of the courts' approach at the time and in the decades preceding these opinions, and the types of constitutional challenges being brought against qui tam actions, this Court's statement that a standing decision "is one of discretion and not of law," *Bd of State Auditors*, 42 Mich at 429, clearly reflects the common understanding throughout the nineteenth century.

d. The constitutional power to issue remedial writs indicates that in Michigan, the judicial power includes cases brought by citizens in the public interest

The Michigan Constitution grants power to the courts to issue prerogative and remedial writs. Const. art. 6, § 16. Prerogative writs include writs of mandamus and certiori, and this provision of the 1963 Constitution replaced earlier provisions that specifically granted the courts power to issue such writs. *See* Const. 1908, art. 7, §§ 4, 10; Const. 1850, art. 6, §§ 3, 8. Historically, writs of mandamus were directed toward public officials to compel them to comply with the law. *See Hickman v Epstein*, 450 SE2d 406, 408 (W. Va. 1994) (citing 52 Am. Jur. 2d Mandamus § 104 (1970); Annotation, Mandamus Against Unincorporated Associations or its Officers, 137 A.L.R. 311 (1942)). As Professor Sunstein put it, "The mandamus action is closely related to the modern citizen suit. The purpose of the mandamus action is to require the executive branch to do what the law requires it to do. This is the same idea that underlies the citizen suit, most conspicuously in the environmental area." Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich L R 163, 172 (1992).

In 1850 when this provision was first included in the Michigan constitution, writs of mandamus were available in many courts at the courts' discretion to protect the public interest, and writs of certiori were often used for the same purpose. *See id.* at 173-74. Indeed, many of the state courts cited above that allow private parties to bring suits to protect the public interest do so pursuant to statutory or common law mandamus power. *See, e.g., Tax Equity Alliance for Mass, supra at* 155. The Michigan Supreme Court has itself issued a writ of mandamus to protect the public interest in a taxpayer case, holding

that taxpayers have a personal interest in any illegal expenditure of public funds. *Elliot v City of Detroit*, 121 Mich. 611, 613; 84 N.W. 820 (1899).

The history of these writs indicates that actions of this type brought by representatives of the public interest were considered to be within the scope of the judicial power throughout the nineteenth century. The Michigan Constitution's grant of power to issue such writs strongly indicates that the constitution's framers did not intend the constitution to preclude the courts from hearing cases brought by plaintiffs to protect the public interest, particularly where the legislature had directed the courts to do so.

2. Federal case law interpreting the Cases and Controversies Clause of the U.S. Constitution is not relevant to the question whether the legislature can by statute confer standing.

Federal standing jurisprudence is based on the Cases and Controversies Clause of the U.S. Constitution. *Nike, Inc v Klasky*, 123 S Ct 2554, 2557 (2003). The Michigan Constitution does not have a cases and controversies clause, or any other language that imports the cases and controversies limitations binding the federal courts. Nor does the separation of powers language in the Michigan Constitution impose the same limitations as the Cases and Controversies Clause of the U.S. Constitution. As explained above, the judicial power at the time the Michigan Separation of Powers Clause was adopted and at the time of the framing of the U.S. Constitution was widely recognized to include the authority to hear suits to protect the public interest. Thus federal constitutional limitations on the judiciary in such cases cannot be based wholly on a general understanding of "judicial power," but must also spring from the Cases and Controversies Clause in the U.S. Constitution. Indeed, the United States Supreme Court consistently refers to the Cases and Controversies Clause as the limiting agent of its jurisdiction.

While federal standing law may be "built . . . on the idea of separation of powers," Raines v Byrd, 521 US 811, 820, 117 S Ct 2312, 138 L Ed 2d 849 (1997), the Cases and Controversies Clause defines federal judicial power in a way that has no corollary in the Michigan Constitution.

Both this Court and the United States Supreme Court have recognized that the judicial power exercised by state courts is not equivalent to the power exercised by federal courts under the Cases and Controversies Clause. In *Lee*, Justice Weaver noted that this Court is not bound by the Cases and Controversies Clause and, moreover, that "the Michigan standing requirements have been based on prudential, rather that constitutional concerns." *Lee,* 464 Mich at 743 & n2 (Weaver, J, concurring). *See also Dodak v. State Administrative Bd,* 441 Mich 547, 560; 495 NW2d 539 (1993). Likewise, the United States Supreme Court has "recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." *ASARCO Inc v Katish,* 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989). The Court affirms this principle to this day. *See Nike v Klasky*, 123 S Ct 2554, 2557 n2 (2003) ("Because the constraints of Article III do not apply in state courts, the California courts are free to adjudicate this case.") (citations omitted); *Virginia v Hicks*, 123 S Ct 2191, 2197; 156 L Ed 2d (2003) ("State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." (quoting *ASARCO* 490 US at 617)).

Other states with constitutional separation of powers provisions virtually identical to Michigan's have recognized that these clauses are not comparable to the Cases and

Controversies Clause of the U.S. Constitution. Thus, the California Court of Appeals upheld a statutory grant of standing[13] in *Nat'l Paint & Coatings Ass'n*, *supra* at 760-761, reasoning as follows:

> The California Constitution does not specify, as does the United States Constitution, that the state's judicial power extends only to "cases and controversies." Article VI, section 1 of the California Constitution provides simply that the state's judicial power is vested in the Supreme Court, Courts of Appeal, superior courts, and municipal courts. Article VI, section 10 provides that superior courts shall have jurisdiction of "all causes" except those given by statute to other trial courts.

Similarly, the Arizona Supreme Court has held, "Because our state constitution does not contain a "case or controversy" provision analogous to that of the federal constitution, we are not constitutionally constrained to decline jurisdiction based on lack of standing." *Sears v Hull*, 961 P2d 1013, 1019 (Ariz, 1998). The Pennsylvania Supreme Court also held up a statute granting blanket standing, stating, "Significantly, the drafters of the Pennsylvania Constitution did not restrict this Court's jurisdiction to matters in which a "case" or "controversy" has been presented, as did Article III of the federal Constitution. *Housing Auth v Penn State Civil Serv Comm'n*, 730 A2d 935, 940-41 (Penn, 1999)

Empire cites cases from three state courts as support for the proposition that "Michigan judges must conform their role to Article III limits because the federal model reflects the proper measure of adjudicative function." Defendants-Appellants Brief on Appeal at 29. However, none of these state courts follow the federal rule that the

---

[13] "[A]ny person in the public interest" may sue 60 days or more after giving notice to the Attorney General and the local prosecutor and city attorney, if none of these authorities have commenced a suit. Citizens bringing such suits need not plead a private injury and instead are deemed to sue "in the public interest." Calif Health & Safety Code § 25249.7(d).

legislature may not grant standing to those who do not meet the judicially-established standing requirements.

The Connecticut Supreme Court did adopt the federal holding that associations have standing if their members would have standing and if the association's purpose is sufficiently related to the subject matter of the lawsuit. *Conn Ass'n of Health Care Facilities v Worrell*, 508 A2d 743, 746-47 (Conn, 1986). But it has never held that the federal courts' interpretation of the U.S. Constitution is determinative of or even relevant to the Connecticut courts' interpretation of the Connecticut Constitution. In direct contradiction to the federal rule, the Connecticut Supreme Court holds that "[s]tanding is not a matter of constitutional law in Connecticut, but is rather a rule of judicial administration . . . ." *Manchester Envtl Coalition v Stockton*, 441 A2d 68, 77 (Conn, 1981). A post-*Lujan* Connecticut case holds that as opposed to classical aggrievement, "[s]tatutory aggrievement exists by legislative fiat, which grants appellants standing by virtue of a particular legislation, rather than by judicial analysis of the particular facts of the case." *Zoning Bd of Appeals v Planning & Zoning Comm'n*, 605 A2d 885, 888 (Conn App 1992). The Connecticut Supreme Court continues to apply the rule that when standing is granted by the legislature, only legislatively-mandated requirements need be met. *See Steeneck v Univ of Bridgeport*, 668 A2d 688, 692 (Conn, 1995); *Water Pollution Control Auth v Keeney*, 662 A2d 124, 129 (Conn, 1995).

Although the Montana Supreme Court has held that its state constitution limits who has standing, *see Stewart v Bd of City Comm'rs of Big Horn County*, 573 P2d 184 (Mont, 1977), it also holds that these requirements may be waived in cases of sufficient public interest, *Comm for an Effective Judiciary v State*, 679 P2d 1223, 1226 (Mont,

1984). Montana does not follow the federal courts' absolute limits on plaintiffs in public interest lawsuits, as Montana taxpayers need not allege that they are affected more than other taxpayers if the question presented is of sufficient public importance. *See Missoula City County Air Pollution Control Bd v Bd of Envtl Review*, 937 P2d 463, 466 (Mont, 1997); *Comm for an Effective Judiciary*, 679 P2d at 1225; *Grossman v State, Dept Natural Res*, 682 P.2d 1319, 1325 (Mont, 1984).

Finally, the Vermont Supreme Court adopted federal standing law in 1949, prior to its modern development. *In re Constitutionality of House Bill 88*, 64 A2d 169, 172 (Vt, 1949). Although it continues to follow this precedent in cases where no cause of action has been granted by the legislature, *Parker v Milton*, 726 A2d 477, 480 (Vt, 1998), it has not held that the Vermont legislature may not grant standing to enforce public rights. Where a legislative cause of action exists, the court looks to that statute to determine whether the case is properly before it, rather than applying the judicially-created standing test. *See Agency of Natural Res v United States Fire Ins Co*, 796 A2d 476, 479 (Vt, 2001) ("Where a statute 'expressly or by *clear implication* grants a right of action,' plaintiffs will have standing even where they raise general grievances or seek to enforce the rights of another party." (Citations omitted.)); *Parker v. Milton*, 726 A2d at 481-82 (construing 42 USC 1983).

The Michigan Supreme Court should look to its own precedents and assess for itself the likely intent of the state's constitutional convention rather than following federal law, particularly where the federal law is based on a constitutional provision that does not appear in the Michigan Constitution. In an analogous situation, this Court has held that state courts "cannot defer to federal interpretations if doing so would nullify a portion of

the Legislature's enactment." *Chambers v Trettco*, 463 Mich 297, 614 NW2d 910 (2000) (citing *Piper v Pettibone*, 450 Mich 565, 571-572; 542 NW2d 269 (1995) and *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27-28; 528 NW2d 681 (1995)). Similarly, this Court should not defer to federal interpretations if doing so would nullify a portion of the constitutional convention's intent.

B. Establishing Who Has Standing Is A Power Vested In The Legislature.

The power to say who may bring a lawsuit and under what circumstances is widely acknowledged to be a legislative one. Legislatures establish causes of action; courts require that a plaintiff identify either a statute or a common law holding that allows the plaintiff to bring the case. Courts establish new causes of action only where the equities are clear, recognizing that such action is ordinarily a legislative one. Thus, for instance, this Court refused to establish a cause of action for a child's loss of his parents' consortium in *Sizemore v Smock*, 430 Mich 283, 299; 422 NW2d 666 (1988), stating,

> It is clear to us that further extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations. In light of these concerns, we believe that the determination of whether this state should further extend a negligent tortfeasor's liability for consortium damages should be deferred to legislative action rather than being resolved by judicial fiat.

Throughout most of the history of Michigan and federal case law, there was no separate analysis of standing as opposed to a cause of action. If a plaintiff had a cause of action granted by the legislature or established by common law, the plaintiff could bring the lawsuit. If he or she did not, the case would not be heard. After a thorough review of historic court practices, Professor Sunstein concluded as follows:

> The relevant practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit. There is no authority to the contrary before the twentieth century, and indeed, I think that there is no such authority before World War II. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L R 163, 177 (1992).

Thus plaintiffs must indeed meet the traditional standing test in order to bring a lawsuit. See Defendants-Appellants' Brief on Appeal at 31. However, courts traditionally have looked to whether a plaintiff has or is likely to suffer an "injury in fact" *only* when she can point to no pre-existing statutory or common law cause of action. Traditionally, a plaintiff had standing to sue whenever a statute granted him that right. To NWF's knowledge, every Michigan standing decision and every federal standing decision prior to *Lujan* applies the "injury-in-fact" requirement only where the plaintiff has no statutory cause of action. The injury-in-fact test simply is not the test that *traditionally* applied to cases wherein the plaintiff had a legislatively-granted cause of action.

1. Establishing standing is universally recognized as a legislative act.

Both federal and state courts uniformly recognize that legislatures have the power to set standing requirements. This Court itself unquestioningly accepted a legislative grant of standing to all taxpayers in *House Speaker v Governor*, 443 Mich 560, 573; 506 NW2d 190 (1993), and noted MEPA's blanket standing provision in *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 307; 224 NW2d 883 (1975). The Michigan Court of Appeals has also consistently recognized that the legislature may grant standing. *See Michigan Soft Drink Assn v Dep't of Treasury*, 206 Mich App 392, 399-400; 522 NW2d 643 (1994); *Trout Unlimited v City of White Cloud*, 195 Mich App 343; 489 NW2d 188,

191 (1992); *Karrip v Township of Cannon*, 115 Mich App 726, 733; 321 NW2d 188 (1982).

The United States Supreme Court has also recognized that standing to bring cases is a proper subject for legislation. Thus, prudential limitations on standing may be "modified or abrogated by Congress." *Bennett v Spear*, 520 US 154, 162; 117 S Ct 1154, 1161; 137 L Ed 2d 281 (1997). Up until the *Lujan* decision, the rule appeared to be that Congress could "open the federal courts to representatives of the public interest through specific statutory grants of standing." *United States v Richardson*, 418 US 166, 193; 94 S Ct 2940; 41 L Ed 2d 678 (1974) (Powell, J, concurring) (citing, inter alia, *FCC v Sanders Bros Radio Station*, 309 US 470; 60 S Ct 693; 84 L Ed 869 (1940); *Scripps-Howard Radio v FCC*, 316 US 4; 62 S Ct 875; 86 L Ed 1229 (1942)). In *Sierra Club v Morton*, 405 US 727, 732; 92 S Ct 1361; 31 L Ed 2d 636 (1972) (citations omitted), the Court observed as follows:

> Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome or controversy" . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." . . . . Where however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those action under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

A great many state supreme courts have also acknowledged that it is the legislature's province to grant standing. *See Doit v Touche, Ross & Co*, 926 P2d 835, 848 (Utah, 1996)(citation omitted) ("It is within the legislature's power to grant a party standing, and where it has expressly chosen to do so, a court should not declare

otherwise."); *O'Brien v O'Brien*, 684 A2d 1352, 1354 (NH, 1996)(citation omitted) ("When the legislature has clearly delineated the class that can petition to enforce a statutory scheme, this court will implement that determination meticulously. Any other approach might well thwart the legislature's goals and intentions."); *State v Philip Morris*, 551 NW 2d 490, 493 (Minn, 1996) ("Standing is acquired in two ways: either the plaintiff has suffered some 'injury-in-fact' or the plaintiff is the beneficiary of some legislative enactment granting standing."); *Key v Chrysler Motors Corp*, 918 P2d 350, 354 (NM, 1996) ("Whether we ask if Key had standing to sue or whether we ask if the Act provided Key with a cause of action, we must look to the Legislature's intent as expressed in the Act or other relevant authority."); *Steeneck v Univ of Bridgeport*, 668 A2d 688, 692 (Conn, 1995) ("Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved."); *Crow v Bd of County Comm'rs*, 755 P2d 545, 546 (Kan, 1988) ("Crow does not claim to be affected differently than any other member of the general public by the county's actions. A private citizen may nevertheless be granted standing by statute."); *City of Middletown v Ferguson*, 495 NE 2d 380, 384 (Ohio, 1986) (accepting for the sake of argument that the city did not have an interest in the litigation and holding that statute conferred standing on city); *Quinn v Donnewald*, 483 NE2d 216, 219 (Ill, 1985) (statute gave taxpayer standing to challenge disbursement of public funds); *Farris v Munro*, 662 P2d 821, 823-24 (Wash, 1983) ("In Washington, absent statutory authorization, a taxpayer does not have standing to challenge the legality of the acts of public officers unless he first requests or demands that a proper public official bring suit on behalf of all taxpayers."); *Indep Sch Dist No 9 v Glass*, 639 P2d 1233, 1237 (Okla, 1982) ("If reliance is not placed on any specific statute

authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged a personal stake in the outcome of the controversy.").

The decision of who should be allowed resort to the courts to remedy a wrong is thus widely recognized as within the legislative power. Moreover, prior to 1970, no court even suggested that this principle might be different when the wrong at stake was suffered equally by all members of the public. *See* Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich L R 163, 184-86 & n14 (1992). Of course, courts often created causes of action themselves, without statutory authorization, when an individual suffered a personal injury, *see Womack v Buchhorn*, 384 Mich 718; 187 NW2d 218 (1971), and usually declined to do so when the injury was to all members of the public. In addition, inherited common law recognized many causes of action for personal injuries. Finally, the due process clauses of the state and federal constitutions require access to the courts if an individual is deprived of certain private rights or interests by the state. It is thus not surprising that historically, courts considered whether an injury is personal or public when deciding whether a litigant has the right to have a case heard when no statute establishes such a right. However, early case law did not establish or recognize limits on the legislature's power to decide who could seek redress in courts for particular wrongs. Given the widespread understanding that limitations on the right to sue to redress public wrongs were a matter of judicial self-restraint rather than based on the constitution, an understanding that was shared by the nineteenth-century

Michigan Supreme Court, it is unlikely that anyone involved in the drafting of the Michigan Constitution in 1850 believed that such limits existed.

2. The legislature may create new legal rights and provide that they are judicially enforceable.

Federal and many state courts limit the cases they will hear to those in which the plaintiff has an interest of sufficient importance to warrant the expenditure of judicial resources and to ensure that the parties are so invested in the outcome that each side will be fully presented to the court. This begs the question, of course, of who should decide what interests rise to this level of importance. Surely this duty lies with the legislature. The perceived importance of different interests changes over time as society changes, and the legislature is the governmental body best equipped to recognize what interests have become so important to the state's citizens that judicial protection of those interests has become warranted. In applying its substantive due process test in *O'Donnell v State Farm Mutual Auto Ins*, 404 Mich 524, 541-42; 273 NW2d 829 (1977)., this Court stated:

> This test recognizes and preserves the constitutional principle of separation of powers, which forms the fundamental framework of our system of government. Its purpose is to make certain that the judiciary does not substitute its judgment for that of the Legislature as to what is best or what is wisest. So long as the Legislature's judgment is supported by a rational or reasonable basis, the choices made and the distinctions drawn are constitutional.

Again, the court pointed out, "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's." *Id.*

Nothing in the nature of judicial, legislative or executive power limits the type of interest that a legislature may recognize as important enough to be protected by judicial process. In Michigan, the state legislature has recognized that an injury to natural

resources of the state is an injury to all. *See* MCL 324.1701. In other words, the legislature has established an interest in all citizens to the continuing existence and quality of Michigan's natural resources, and has allowed all citizens access to the courts to protect that interest. Judicial refusal to recognize and protect this interest would improperly displace the legislature in this quintessentially legislative determination.

Put in this context, NWF does not disagree with the statements that "a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected," Defendants-Appellants' Brief on Appeal at 18, that "the party seeking legal protection must have a sufficient interest to invoke the judicial process," *id.* at 17, or that plaintiffs must have "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy," *id.* at 16. The legislature, however, is the branch of government that must decide what interests are legally protected, what interests are sufficient to invoke the judicial process, and what stakes are sufficient to obtain judicial resolution. The judiciary simply does not have the responsibility to make those decisions.

A majority of the United States Supreme Court appears to agree that under the federal system, Congress may establish such rights, specify what will amount to an injury to such rights, and provide a judicial remedy for those rights. In the *Lujan* case, 504 US at 580 (Kennedy, J, concurring) (citations omitted), two members of the six-member majority joined Justice Scalia's opinion striking down the blanket standing provision of the Endangered Species Act only under the following understanding:

> As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison

> to get his commission, or Ogden seeking an injunction to halt Gibbons' steamboat operations. In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view.

Justices Kennedy and Souter joined in Justice Scalia's opinion because they found that Congress had not articulated the injury that the citizen suit provision was meant to address. *Id.* at 582. It is thus uncertain that these justices would find the MEPA grant of standing unconstitutional even under federal jurisprudence. *Compare* 16 U.S.C. 1540(g)(1)(A) ("any person may commence a civil suit . . . to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter") *and* MCL 324.1701 ("any person may maintain an action . . . against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.").

C. The Legislature's Grant Of Standing Under The Michigan Environmental Protection Act Does Not Allow The Judiciary To Exercise Executive Power Or Otherwise Diminish The Executive Power.

In enacting MEPA, the legislature did not violate the separation of powers by authorizing the judiciary to exercise executive power. If the legislature did delegate executive power, it was to the state's citizens, from whence the power originates. The executive branch would suffer no diminishment of its power as a result of such a delegation. Indeed, the executive branch retains all of its power to see that the laws are faithfully executed. The only "power" that the executive branch conceivably could have lost is the power to refuse to enforce the law, a power that is surely not constitutionally mandated.

1. Any delegation of executive power is to private citizens, not the judiciary.

When the legislature grants any citizen the right to sue to protect an interest shared by all, it is not exercising executive power itself, nor is it directing the courts to exercise that power. The legislature does not take any action after the initial act of legislation, and the courts perform exactly the same function that they perform in cases where plaintiffs meet prudential standing requirements: assessing the facts as presented by two opposing parties, determining which version of contested facts is more likely true, and applying the law as written to that set of facts.

The only exercise of the executive power pursuant to such a legislative grant (that is to say, prosecuting a lawsuit or seeing that state agencies act within the bounds of the law) is by members of the public. Thus the only delegation of power, if there is one, is to the public itself, which according to the Michigan Constitution is the original source of all governmental power. *See* Const 1963, art 1, § 1 ("All political power is inherent in the people."). This no more violates the separation of powers doctrine than does the jury system (under which the public exercises the judicial power) or the initiative and referendum (under which the public exercises the legislative power). Furthermore, nothing in the constitution precludes this exercise of power by the people. *See* Const 1963, art 1, § 23 ("The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

The federal courts' treatment of qui tam actions, discussed above, supports this understanding. Actions by individuals standing in the place of the state had been commonly entertained for centuries when the Separation of Powers Clause of the Michigan Constitution was first adopted. Many states allowed such actions by statute at

the time. Early Michigan cases discussing the role of private parties prosecuting on behalf of the state did not question the practice as a usurpation of executive power. Quite the contrary, they recognized that such actions might be particularly proper when the executive failed to act to enforce the law. *See People v Bd of State Auditors*, 42 Mich 542; 4 NW 272 (1880).

As the United States Supreme Court so aptly put it in approving a legislative grant of standing to enforce the Communications Act of 1934, "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." *Scripps-Howard Radio v FCC*, 316 US 4, 15; 62 S Ct 875; 86 L Ed 1229 (1942) (citations omitted).

2. The constitution's delegation of executive power does not place the executive above the law.

The alleged violation of the separation of powers doctrine in this case stems not from a delegation of executive power to the judiciary, but from an alleged diminishment of executive power through the actions of citizens. Apparently because this may expand the number of cases where the court may review actions taken by state agencies, Empire argues that the executive power is diminished.

However, the only power that this grant of standing may diminish is the power to *refuse* to enforce the law. This cannot be considered a valid power of the executive, given its duty to see that the laws be faithfully executed. Nor should it be considered a positive outcome of the separation of powers, especially when it results in the permanent destruction of the state's natural resources.

Furthermore, the only public harm that Empire has identified as arising from this grant of standing is that it would "pull the judiciary into constant dispute with the executive branch." Defendants-Appellants' Brief on Appeal at 33. In the more than thirty years that have passed since the enactment of MEPA, no "constant dispute" has materialized, and the executive does not see it as a significant threat.

The Michigan courts employ other safeguards to ensure that such a dispute will not materialize. Most notably, they defer to agencies when a statute is capable of more than one interpretation. *See Consumers Power Co v PSC*, 460 Mich 148, 154; 596 NW2d 126 (1999) ("the interpretation given to statutes by the agency charged with applying them is entitled to great deference").

The only time courts overturn agency action is when the illegality of the agency action is clear; even in cases that do not involve the public interest, courts are not in the business of second-guessing how the law is executed—so long as it can be said that the law *is* being executed. Thus, any "constant dispute" that could arise between the judiciary and executive would occur only if the executive consistently refused to follow the law, and abandoned its constitutional duty to see that the laws are faithfully executed.

In the case at bar, MDEQ has issued a permit to deposit enough waste rock into 4700 linear feet of streams to completely obliterate them. Under the federal Clean Water Act, states may not permit any discharge of fill material that will cause the violation of a state water quality standard. 40 CFR 230.10(b)(1). Michigan water quality standards do not allow deposits or solids in streams "which are or may become injurious to any designated uses." 1986 AACS, R 323.1050, . A designated use for the streams at issue is to support indigenous aquatic life and wildlife. 1999 AACS, R 323.1100(1)(f). Filling

the streams with deposits will clearly be injurious to the aquatic life and wildlife that depend on them, and thus may not be permitted.

Under Empire's view of standing law, no citizen would have standing to challenge this destruction of the state's natural resources, because it occurs on streams and wetlands entirely surrounded by Empire's land. Where the executive refuses to follow the law as written, the judiciary would have no opportunity to review the legality of this loss of state resources. Such an outcome would completely stymie the legislature's constitutional duty to "provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction." Const. 1963, art. 4, § 52.

II. THE MICHIGAN CONSTITUTION SPECIALLY AUTHORIZED THE LEGISLATURE'S GRANT OF STANDING UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

In 1963, Article 4, section 52, was included in the Michigan Constitution, providing as follows:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety, and the general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction.

According to the Constitutional Convention, "This is a new section recognizing public concern for the conservation of natural resources and calling upon the legislature to take appropriate action to guard the people's interest in water, air, and other natural resources." Address to the People: What the Proposed new State Constitution means to you, Lansing, Michigan, August 1, 1962.

Under the constitution, then, it is the legislature's province to determine how to fulfill the constitutional mandate to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Const 1963, art 4, § 52. In response, the legislature chose to enact MEPA, and deemed it necessary to allow any citizen to bring a lawsuit to implement the law. By granting such open standing, the legislature carried out the responsibility specially delegated to it by the legislature, building in a safety net of citizen enforcement to ensure the protection of the state's natural resources in situations where the agency lacked the resources or the will to enforce the law.

III. THE COURT SHOULD DEFER TO THE LEGISLATURE'S AND EXECUTIVE'S INTERPRETATIONS OF THE CONSTITUTION.

This Court has consistently held that where the constitution allows for more than one interpretation, the Court's view is no more authoritative than that of the other branches. Especially in a case such as this where the legislative and executive branches are in agreement, and the legislative or executive power is the one allegedly infringed, any uncertainty should be resolved in accordance with the views of the other two branches of government.

A. Both The Legislative And Executive Branches Of Michigan's Government Believe The Grant Of Standing Under The Michigan Environmental Protection Act Is Constitutional.

When MEPA was contemplated, debated, and enacted, the grant of open standing to protect natural resources was a primary goal, supported both by the legislative and executive branches. The legislature passed MEPA into law with a 98-3 vote in the House of Representatives, and a 20-18 vote in the Senate. The legislative history demonstrates that the legislature not only was aware of the open standing provision, its grant of

standing to all persons was purely intentional. Specifically, when MEPA was in the form of House Bill 3055, Governor Milliken's legal advisor issued a document called "Proposed Changes to House Bill 3055," outlining the addition of the "any person" language. App 25b. The House accepted this change. On the Senate side, during a floor debate, Senator Brown stated as follows:

> One difference in this bill as opposed to the Common Law nuisance theory is that you don't have to actually be injured . . . . [S]o therefore, any person has a cause of action. So a person from the U.P. could sue Chrysler Motor Car Co. in Highland Park or the Highland Park citizen could sue one of your good copper mines in the U.P. That's who may bring the suit. App 33b.

This legislative history shows that legislators knew that MEPA granted open standing when they enacted it. Furthermore, no evidence indicates that anyone questioned its constitutionality at the time of its passage. Indeed, in 1970 there was no basis on which to doubt its constitutionality, as neither state nor federal courts had yet questioned the legislature's ability to establish standing.

The Governor and the Michigan Department of Natural Resources ("DNR") also strongly supported MEPA at the time of its enactment, including its grant of open standing. Governor Milliken stated, "This unprecedented legislation reflects our belief in Michigan that *every member of society* should have recourse immediately available for halting dangerous pollution of the environment in which he lives." App 14b (emphasis added). The DNR, the agency charged with protecting the environment when MEPA was enacted, heralded MEPA as an "additional, highly desirable method for a citizen . . . to protect our environment and natural resources from pollution, impairment, or destruction." App 21b.

Moreover, the then-Chief Justice of the Michigan Supreme Court lauded MEPA's revolutionary approach to putting environmental protection into the peoples' hands:

> For Michigan, I think, was unique in the nation and perhaps the world. We have adopted, in the Environmental Protection act of 1970, a law by which the legislature, in its wisdom, has accepted and pronounced the common law theory that the rights of many are best protected and the duties of man are best enforced in specific individual cases and that the place to do this is in a court of law . . . [MEPA is] a broad charter . . . [MEPA] permits any person and this includes government body, public body, private corporation, individual person or groups of persons to sue any other person, government body, private corporation or public body for the protection of the air and water and other natural resources of the state. Presentation of then-Michigan Supreme Court Chief Justice Brennan to St. Clair County Pollution Probe, undated. App 18b.

B. This Court Should Hold The Legislature's Grant of Standing Constitutional Because Its Unconstitutionality Is Not Clearly Apparent.

Legislative action is presumed to be constitutional, and will not be overturned unless its unconstitutionality is clearly apparent. *Blank v Dep't of Corr*, 462 Mich 103, 157; 611 NW2d 530 (2000) ("We exercise our power to declare a statute unconstitutional only when the violation is clear."); *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999) ("[It is] a well established rule that a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent."); *Caterpillar v Department of Trans*, 440 Mich 400, 413; 488 NW2d 182 (1992) ("Legislation that is challenged on constitutional grounds is 'clothed in the presumption of constitutionality' and 'A statute is presumed constitutional absent a clear showing to the contrary' and 'It is the duty of this Court to give the presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears.'")

Given the historic position of this Court, the holdings of the high courts of other states, the historic practice of allowing suits to vindicate the public interest where the

legislature has so decreed, and the legislature's constitutional duty to ensure protection of the natural resources of the state, the unconstitutionality of this grant of standing cannot be said to be clear. Virtually the only evidence that it might be unconstitutional derives from United States Supreme Court cases interpreting a clause that does not exist in the Michigan Constitution. Under these circumstances, the Court should defer to the rational and well-founded beliefs of the other two branches that this grant of standing does not violate the separation of powers doctrine, and is thus constitutional.

C. The Court Should Respect The Executive Branch's Endorsement Of The Legislature's Grant Of Standing.

Thirty years after its enactment, the executive branch continues to support MEPA's grant of open standing. The MDEQ has articulated its support in its brief submitted to this Court, stating that the broad grant of authority to the legislature under article 4, section 52 constitutes authority for the legislature to grant standing to those who may not meet the judicial test. In MDEQ's view, this section provides the legislature with authority to abrogate the Court's traditional standing test by vesting in citizens a new legal interest and providing a means for enforcing that interest.

The executive branch is uniquely qualified to determine whether a legislative enactment usurps its authority because it is the entity that deals with the actual consequences. *See National Paint & Coatings Assoc. v. California*, 58 Cal. App. 4th 753, ? ; 68 Cal. Rptr. 2d 360 (1997) (upholding grant of standing to "any person" largely based on executive's support of the grant and challenger's lack of showing that the standing provision impeded the executive's ability to implement the challenged statute). Accordingly, the Court should be guided by the executive's endorsement of MEPA.

IV. IF THE FEDERAL RULE IS ADOPTED, IT SHOULD NOT BE LIMITED TO THE *LUJAN* HOLDING.

As explained above, the historically and logically accurate reading of the Michigan Constitution is that it allows the legislature to grant standing to all citizens to protect their interests in the state's natural resources and environment through recourse to the courts. However, if the Court does adopt the federal rule established in *Lujan*, that the legislature is limited in the degree to which it can provide standing to all citizens to protect public interests, it should adopt later federal jurisprudence applying *Lujan* as well. Adoption of the *Lujan* holding would equate the state's separation of powers doctrine with the federal Cases and Controversies Clause. Subsequent federal case law would thus be highly relevant in interpreting the Michigan Constitution.

This Court should be particularly careful to interpret any federal law that it does adopt as broadly as possible when considering the constitutionality of a legislative enactment. As explained above, Michigan courts defer to the legislative judgment of constitutional meaning except in the clearest of cases. This Court should interpret any adoption as broadly as possible to give force to legislative intent.

A. Cases Following *Lujan* Illustrate That A Party May Sue If His Enjoyment Of A Particular Location May Be Diminished By Another Party's Actions.

Lujan addressed a situation that was very different from the case at bar; subsequent United States Supreme Court cases addressing facts similar to the facts in this case illustrate that the Court did not intend the *Lujan* decision to alter its previous recognition that parties have standing if their enjoyment of a particular place is threatened by the defendant's actions. *See, e.g., Sierra Club v Morton*, 405 US 727, 734-35; 92 S Ct 1361; 31 L Ed 2d 636 (1972). The *Lujan* case addressed affiants who were seeking court

intervention to address alleged legal violations that affected natural resources (endangered species) on the other side of the world. Although they had visited the places where the impacts would occur, they had no firm plans to return to those places. The Court's dismissal of the case rests on that particular fact; as the concurring opinion pointed out,

> While it may seem trivial to require that [affiants] acquire airline tickets to the project sites or announce a date certain upon which they will return . . . this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced. 504 US at 579 (Kennedy, J, concurring) (citation omitted).

In a subsequent opinion, the Court addressed affiants that lived near the affected site and visited it regularly. There, the Court found that standing was satisfied on the basis of affidavits averring a decrease in recreational and aesthetic enjoyment due to the affiants' "concerns" about the polluted area. *Friends of the Earth v Laidlaw*, 528 US 167, 181-82; 120 S Ct 693; 145 L Ed 2d 610 (2000) (affiant "would like to fish, camp, swim, and picnic in and near the river" and "would like to fish in the river at a specific spot he used as a boy, but . . . would not do so now because of his concerns about Laidlaw's discharges"). The Court unequivocally held that injuries to recreational interests are sufficient to support standing. *Id.* at 183 (quoting *Morton*, 405 U.S. 727, 735) ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity").

In addition to the *Laidlaw* decision, many post-*Lujan* United Sates Court of Appeals decisions emphasize that diminishment of recreational and aesthetic pleasure is enough to confer standing. *See, e.g., Ecological Rights Found v Pac Lumber Co*, 230 F3d

1141 (9th Cir 2000) ("an individual can establish injury in fact by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable. . . ."); *Rhodes v Johnson*, 153 F3d 785 (7th Cir 1998) (standing exists where the plaintiffs alleged a diminishment in their use and enjoyment of the land, specifically hiking and nature photography). The Ninth Circuit has specifically held that the lack of a legal right to enter the disputed site does not preclude plaintiffs from having standing. *See Cantrell v City of Long Beach*, 241 F3d 674, 681 (9th Cir 2001) ("[W]e have never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring. If an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact.").

Thus, while it is not immediately apparent from the text of the *Lujan* test, that test does not require that the plaintiff's *legal* interest in the subject matter of the lawsuit be greater than that of the public at large. If there is a requirement under *Lujan* that the plaintiff's interest be greater than that of the public at large (and we argue below that there is not), that requirement refers to the plaintiff's *actual* interest. In other words, a plaintiff's *right* to enjoyment of resources does not need to be greater than that of the general public to support standing in a suit to protect that resource. Rather, if the plaintiff *actually* enjoys the resource more than the general public, an injury to that resource that affects the plaintiff's enjoyment constitutes a "particularized" interest.

This is the only way to make sense of the relevant case law. In the *Laidlaw* case, the affiants had no greater right to enjoy the river whose water quality was threatened than did any other citizen. In *Lujan*, if the affiants had been able to show that they had

specific plans to visit the affected areas—that is to say, if they had had plane tickets in hand—and had thus had standing, they still would have had no greater right than any other citizen to visit the area and enjoy the wildlife that was threatened with extinction.

The undisputed evidence in this case is that wildlife habitat at the project site will be destroyed, and wildlife activity in the vicinity of the site (that is to say, beyond the site's immediate borders) is likely to decrease. App 1b. Affiants recreate just beyond the borders of the site and enjoy viewing wildlife there; their wildlife-viewing outings are thus likely to be diminished by the project at issue. App 42a–47a. In addition, one of the affiants skis in an area immediately adjacent to the site; piles of waste rock clearly visible from the area where they ski will diminish his aesthetic enjoyment of this activity. App 43a. Under relevant federal case law interpreting Lujan, these threatened injuries are clearly sufficient for standing purposes.[14]

B. Under the *Lujan* Decision, Plaintiffs Are Not Required to Show an Injury Greater Than That of Other Citizens.

In the *Lujan* decision, concurring Justices Kennedy and Souter rejected the suggestion that the injury required by the *Lujan* test could not be an injury shared by large segments of the population.[15] While they agreed that the Cases and Controversies Clause of Article III limits federal courts to hearing lawsuits wherein the plaintiff has suffered a "concrete and personal injury," they explicitly did not agree that the injury

---

[14] Plaintiffs challenged the Circuit Court's holding that they did not have standing under the traditional standing test before the Court of Appeals. The Court of Appeals did not rule on this issue. Therefore, if the Court does reverse the Court of Appeals decision, this case should be remanded to the Court of Appeals to address this issue.

[15] These two concurring justices (Kennedy and Souter) were included in the six-member majority in the controlling opinion. Their interpretation of that opinion is thus highly relevant in determining the majority position of the Court.

must be greater than that suffered by the rest of the public. *Lujan,* 504 US at 581 ("it does not matter how many persons have been injured by the challenged action."). Following *Lujan*, the United States Circuit Courts of Appeals continue to hear cases brought pursuant to statutes that vest interests in large segments of the population—in some cases, larger numbers than the entire population of Michigan. *See, e.g., Public Citizen v Dep't of Transp*, 316 F3d 1002, 1015 (9th Cir 2003) (plaintiffs had standing because they lived in Los Angeles, San Diego, and Houston, the areas most likely to be impacted by the challenged government action); *Sierra Club v EPA*, 129 F3d 137, 139 (DC Cir 1997) (organization had standing to challenge regulation that would allow higher levels of air pollution in regions where members lived).

The one injury that the *Lujan* concurrence held would be insufficiently concrete for the courts to enforce is "the public's nonconcrete interest in the proper administration of the laws." *Id.* To be very clear, the plaintiffs in the case at bar are not attempting to vindicate an abstract interest in seeing that the laws are enforced. This case challenges a permit that would allow the complete destruction of eighty acres of wetlands and nearly a mile of streams. These resources will not just be impaired, they will be obliterated. Once they are gone, they will be gone forever. The Michigan Legislature has established a legally enforceable interest in all citizens, including members of the Upper Peninsula Environmental Coalition and the National Wildlife Federation, in the continued existence of these resources. These interests will be destroyed when the resources are destroyed.

RELIEF

For the foregoing reasons, Plaintiffs-Appellees National Wildlife Federation and Upper Peninsula Environmental Council respectfully request that this Court affirm the Court of Appeals' decision. Should the Court reverse the Court of Appeals' decision, the Court should remand to the Court of Appeals to address whether plaintiffs-appellees have standing under the traditional standing test.

Respectfully submitted,

F. Michelle Halley (P62637)
P.O. Box 914
Marquette, Michigan 49855
(906) 361-0520

Neil S. Kagan (P58948)
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
734-769-3351

Counsel for Plaintiffs-Appellees

Jane Reyer
220 Pike Lake Road
Grand Marais, Minnesota 55604
(218) 387-3377

Of Counsel

DATE: October 23, 2003